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Supreme Court of the United States

OCTOBER TERM, 1964

No. 727

STANKER AND GALETTO, INC., a corporation of New Jersey, and LEON STANKER and PETER GALETTO, Individually,

Petitioners,

vs.

EARTH MOVERS, INC., a corporation of Delaware,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

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To the Honorable, the Chief Justice of the United States, the Associate Justices of the Supreme Court of the United States:

(Emphasis ours unless otherwise noted)

Petitioners pray that a writ of *certiorari* issue to review the judgment of the New Jersey Superior Court, Appellate Division entered in the above entitled case on June 11, 1964 (P3a),* which judgment the Supreme Court of New Jersey refused to review by its Order denying Petitioners' petition for Certification entered in the above entitled case on September 14th, 1964 (P1a).

Opinions of the Courts Below

The Order of the New Jersey Supreme Court denying Certification is reported in 43 N. J. 263, 203 A. 2d 716. The opinion and judgment of the New Jersey Superior Court, Appellate Division, is reported in 84 N. J. Super. 178, 201 A. 2d 387. The Oral Opinion and Interlocutory Order rendered by the Superior Court, Law Division, Cumberland County, granting the motion to set aside the service of process on Earth Movers, Inc., the respondent herein, is not reported. All the opinions, judgments or orders of the courts below, whether reported or not, are printed in the appendix annexed hereto.

Jurisdiction

This petition is submitted pursuant to Revised Rules 19 and 23 of this Court to satisfy the Court that a Federal question is presented and that it should take jurisdiction.

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* "P-a" refers to Appendix annexed hereto; "A-a" refers to Appendix of Defendants-Third Party Plaintiffs-Appellants, (Petitioners') filed below.

The Order of the New Jersey Supreme Court dated September 14, 1964 was entered on September 14, 1964, which Order impliedly affirmed on the merits, the judgment of the New Jersey Superior Court, Appellate Division dated June 11, 1964, entered June 11, 1964. The judgment of the Appellate Division affirmed the Order of the New Jersey Superior Court, Law Division, Cumberland County, from which the defendants-petitioners appealed, viz:

The judgment of the New Jersey Superior Court, Law Division, Cumberland County, dated July 26, 1963 and filed on July 29, 1963, which judgment dismissed the service of summons and complaint by registered mail upon the third-party defendant, Earth Movers, Inc., a Delaware Corporation, upon the ground that the activities of the said Earth Movers, Inc. in the State of New Jersey, if any, were not sufficient in the law to sustain the said service of process pursuant to the Revised Rules of Civil Procedure of the New Jersey Supreme Court, R.R. 4:4-4(d) (P12a).

The jurisdiction of this Court is invoked under 28 U. S. C. A. 1257 (3).

Questions Presented for Review

1. Where a corporation of Delaware solicited through the mails and by telephone to the general construction contractor in New Jersey for a subcontract to provide ground "fill" and top soil at a construction site in Delaware and forwarded a subcontract which was consummated in New Jersey and payments on account thereof were thereafter forwarded from New Jersey to the subcontractor in Delaware, did this constitute sufficient "minimum contacts" in the State of New Jersey in the jurisdictional sense?

2. Where the employee of another subcontractor was allegedly injured by falling off a truck when its wheels

sank into the "fill" and the said employee sues the general contractor in New Jersey, does not the fair and orderly administration of the law require that the "fill" subcontractor be joined as a third-party defendant to such suit?

3. Where the "fill" subcontractor was served with summons and third party complaint by registered mail, return receipt requested, at its home office in Delaware pursuant to the Revised Rules of the Supreme Court of New Jersey, R.R. 4:4-4(d), was such service sufficient to give the New Jersey Court *in personam* jurisdiction over the Delaware corporation?

4. Did the Appellate Division commit error in affirming the judgment of the Superior Court, Law Division, Cumberland County, which dismissed the service of process in this action on the third-party defendant, Earth Movers, Inc., on the ground that Earth Movers, Inc., a Delaware corporation, did not have the necessary minimum contacts with the state of New Jersey to permit our courts to exercise *in personam* jurisdiction over said corporation by service of process by registered mail on an officer of said corporation at its office in Seaford, Delaware?

Constitutional Provisions and Statutes Involved

United States Constitution—14th Amendment, Par. 1:

"1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without

due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Rules of the New Jersey Supreme Court. Provides that service can be made, as follows:

"4:4-4 Summons; Personal Service

(d) Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), an officer, director, trustee or a managing or general agent; or if service cannot be made upon any of the foregoing and if there is no office or place of business within this State, by serving any servant of the corporation within this State acting in the discharge of his duties; or by delivering a copy of the summons and complaint to any person authorized by appointment or by law to receive service of process on behalf of the corporation; or by leaving a copy of the same at the registered office of the corporation with any person in charge thereof; or, *if service cannot be made upon any of the foregoing and the corporation is a foreign corporation, then, subject to due process of law, by mailing, registered mail return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.*"

Statement of the Case

A. Events Before Litigation Commenced.

Stanker and Galetto, Inc., a corporation of New Jersey, and Leon Stanker and Peter Galetto, individually, are the petitioners in this cause. They were engaged in construction work with office located in Vineland, Cumberland County, New Jersey, in the spring of 1960 when they entered into a contract with U. S. Plywood Corp., a corporation of New York, for the erection and construction of a

warehouse in Seaford, Delaware. As part of the work in the completion of the contract, the placing of fill in the area surrounding the warehouse was required and petitioners made inquiry of Earth Movers, Inc., third party defendant-respondent (hereinafter referred to as respondent), a corporation of Delaware, and Louis H. Callaway, its President and active agent. Thereafter, following a period of negotiation between petitioners and respondent, a written proposal in the form of a written offer (A32a to A35a) under date of April 11, 1960, and addressed to petitioners, was forwarded by mail by respondent to petitioners, at Vineland, New Jersey, for acceptance and execution by petitioners. After further negotiation and under date of May 5, 1960, a second written proposal (A36a to A38a) was forwarded by respondent to petitioners by mail to petitioners' office at Vineland, New Jersey, and this proposal was in the form of a written offer which was thereafter executed by petitioners by Peter Galetto at the office of petitioners in Vineland, New Jersey, and returned to respondent by mail to the office of the respondent in Seaford, Delaware. This written contract (A36a to A38a) which came into being at the office of petitioners in Vineland, New Jersey, became the binding agreement between petitioners and respondent for the performance of the work at the warehouse premises by respondent as a subcontractor of petitioners. During the progress and at the completion of the work by respondent, on several occasions, namely, on May 31, 1960, June 8, 1960, September 14, 1960, September 19, 1960, and November 10, 1960, based on statements forwarded by respondent to petitioners at their office in Vineland, New Jersey, checks (A41a) were executed and issued by petitioners in Vineland, New Jersey, to the order of respondent and thereafter forwarded to respondent at Seaford, Delaware.

On October 15, 1960, while the work of respondent at the warehouse premises in Seaford, Delaware, was in progress and still incomplete, the plaintiff, David Webb, Jr., engaged in painting the exterior of the warehouse premises as a member of Webb Construction Company, Inc., and as a subcontractor under a written contract with petitioners (A50a) fell from a scaffold erected on a flat bed truck and received injuries.

B. Events After Litigation Commenced.

In the action instituted in the New Jersey Superior Court, Cumberland County, David Webb, Jr., as plaintiff, claims damages against petitioners (A1a) charging that he fell because the fill which was placed on the premises was improperly placed and his truck sank in the fill and he was thrown from the truck. This fill was placed on the premises by respondent by contract with petitioners (A36a to A38a). Petitioners, during the course of the proceedings in the Superior Court, Cumberland County, applied for an obtained permission to join respondent as a third party defendant as a joint tort feasor and as an indemnitor (A17a) and, after the third party complaint was filed (A18a to A20a), a third party summons was issued thereon (A21a) and served upon respondent by registered mail (A22a to A23a), addressed to the respondent at Seaford, Delaware, where it was received as indicated by an executed registered mail receipt (A23a). Following service upon respondent by registered mail and on motion of attorneys for respondent (A24a to A28a) the service of the third party summons on respondent was dismissed (A45a) on the ground that the activities of the respondent in the State of New Jersey were not sufficient to sustain the service of process within the provisions of R.R. 4:4-4(d) (A42a to A44a). It was at this point in the proceedings that the constitutional question of due process arose.

On the issues of due process, the New Jersey trial Court declared that it would be resolved upon the requisite minimum contacts in New Jersey to give the Court *in personam* jurisdiction, the philosophy of which is set forth in *International Shoe Company* v. *State of Washington,* 326 U. S. 310, 90 L. Ed. 95, 66 Sup. Ct. 154 (1945), and in *Hoagland* v. *Springer,* 74 N. J. Super. 275 (1962), 181 A. 2d 193, which was affirmed by the Appellate Division in 75 N. J. Super. 560, 183 A. 2d 678, and again affirmed by *Per Curiam* opinion of the New Jersey Supreme Court in 39 N. J. 32, 186 A. 2d 679 (P14a). The trial Court went on to say, "The question is, did the defendant do some act, or consummate some transaction within the State, and in addition thereto, does the cause of action arise out of, or does it result from action of Earth Movers within the forum?" (P14a). Thus the trial Court found in error when it concluded that in addition to doing some act or consummating some transaction within New Jersey, the cause of action had to arise out of, or result from Earth Mover's activities within the forum. It also found in error when when it stated that the problem of convenience was not before the Court. This ruling is contrary to the observation made by Chief Justice Stone, in *International Shoe, supra,*—that an estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant in this connection.

The Appellate Division, on application, granted leave to appeal (A46a) and thereafter the appeal was perfected, argument on the appeal was presented and the Appellate Division determined by Opinion dated June 11, 1964 (P3a) that the judgment of dismissal (P12a) should be affirmed on the ground that the necessary minimum contacts on the part of the respondent to give jurisdiction to

our New Jersey Court were not present and that the further extension of the law dealing with minimum contacts does not apply to all contracts, although it has been applied in the field of insurance contracts, noting that petitioners' third party complaint (P9a to P10a) was not upon the contract and concluding that in any event our New Jersey Courts are not able to obtain *in personam* jurisdiction over respondent with service by mail under the standards presently laid down in the decision of the United States Supreme Court and in the decisions of our New Jersey Courts. Mandate on affirmance thereafter was issued (P2a).

Notice of petition for certification to the New Jersey Supreme Court was served on June 29, 1964, and thereafter filed. On September 14, 1964, the Supreme Court of New Jersey denied certification (P1a).

Reasons for Granting the Writ

1. The New Jersey Courts have decided a Federal question regarding due process not in accord with this Court's recognition of due process and the applicable decisions of this Court.

   A. The New Jersey Courts having adopted the minimal federal due process requirements in extending *in personam* jurisdiction of its courts over foreign corporations, have decided the *quantum* of minimal contacts not in accord with this Court's recognition of federal minimal due process requirements.

2. Furthermore, the questions presented are of far-reaching importance to all states and are of great and recurring significance in the administration of justice in state courts.

POINT I

The New Jersey courts have decided a federal question regarding due process not in accord with this Court's recognition of due process and the applicable decisions of this Court.

A. The New Jersey courts having adopted the minimal federal due process requirements in extending *in personam* jurisdiction of its courts over foreign corporations, have decided the *quantum* of minimal contacts not in accord with this Court's recognition of federal minimal due process requirements.

The concept of a State's jurisdiction over non-resident individuals and foreign corporations was given an expansive step forward by the decision of this Court in *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1959). In *McGee, supra*, the respondent insurance company had never solicited or done any insurance business in California apart from the mailing from its Texas home office of a reinsurance certificate to the insured in California, who was the son of the petitioner, the beneficiary under the policy. The insured accepted this offer of insurance and from that time until his death paid the premiums by mail from his California home to respondent's Texas office. Upon the insured's death, respondent refused to pay the mother's claim. Thereupon the beneficiary instituted suit in California and served the respondent with process by registered mail at its principal place of business in Texas, and the petitioner recovered a judgment. The California Court based its jurisdiction on a State Statute which subjects foreign corporations to suit in California on insurance contracts with residents even though such corporations cannot be served with process within its borders.

The petitioner thereafter filed suit on the judgment in the State of Texas and the Texas Courts refused to enforce it holding it void under the Fourteenth Amendment because service of process outside of California could not give the Courts of that State jurisdiction over the insurance company.

This Court therein held that "due Process" requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not affend "traditional nctions of fair play and substantial justice."

The operative jurisdictional facts that obtain in the case *sub judice* are closely analogous to those that obtain in the *McGee case, supra.* The points of similarity are:

(a) In *McGee,* the defendant was a foreign insurance corporation that had never before done or solicited any business in the State of California—

In the case at bar, the respondent, Earth Movers, Inc. contends that it is a foreign corporation and that it has never before done or solicited any business in the State of New Jersey;

(b) In *McGee,* the defendant mailed from the State of Texas to the plaintiff in California a reinsurance contract which the plaintiff accepted in California—

In the case at bar, the respondent, Earth Movers, Inc. mailed from the State of Delaware to the petitioners a contract (A36a) which the petitioners accepted and executed in New Jersey;

(c) In *McGee,* the plaintiff made payments by mail from California to the corporation to its home office in Texas—

In the case at bar, the petitioners forwarded payments by mail from New Jersey to respondent, Earth Movers, Inc. to its home office in Delaware (A41a);

(d) In *McGee,* the foreign corporation was sued in California and it was served with process by registered mail at its principal place of business in its home State of Texas, in pursuance to a California State Statute which authorized such method of service—

In the case at bar, the respondent, Earth Movers, Inc. has been sued in New Jersey and was served with process by registered mail (A23a) at its principal place of business in its home State of Delaware, in pursuance to R.R. 4:4-4(d) which authorizes such method of service.

The Supreme Court of New Jersey in the case of *A & M Trading Corp.* v. *Pennsylvania R. Co.*, 13 N. J. 516 (1953) 100 A. 2d 513, unanimously adopted the principle enunciated in *International Shoe, supra,* and it went on to state, at page 517 of the Reporter, line 5:

"In Frene v. Louisville Cement Co., 77 U. S. App. D. C. 129, 134 F. 2d 511, 517, 146 A. L. R. 926 (1943), the court, discussing the 'solicitation plus' rule, held business activities need not reach the final stage of contract and 'very little more than "mere solicitation" is required to bring about the result that a corporation is present' for jurisdictional purposes."

In April, 1957, District Judge Hartshorne, in *Dodd* v. *Rahway Valley Company,* 150 F. Supp. 599 (U. S. D. C. N. J. 1957), pointed out on page 601 that the New Jersey Supreme Court had adopted the doctrine enunciated in *International Shoe, supra.* The Court further said on page 600, second paragraph, last sentence, that the Federal and

New Jersey rule seem largely the same as to the crucial question as to what constitutes "doing business" within the jurisdiction within the intent of the service procedure, and that both the "Federal and New Jersey rule appear to be substantially more liberal than the rule in that regard as applied in certain other jurisdictions." The Court further said at page 602, first column, third paragraph, bottom:

> "A. & M. Trading clearly shows, 13 N. J. at page 525, 100 A. 2d at page 517, that it is the intent of the New Jersey service procedure that, whatever else is included within the term, a foreign corporation is 'doing business' within the state when its activities constitute 'solicitation plus.' Moreover, as A. & M. Trading further says, and apparently approves, Frene held that such 'business activities need not reach the final stage of contract and very little more 'than mere solicitation' is required to bring about the result that a corporation is 'present' for jurisdictional purposes.' This mere solicitation without reaching the final stage of contract exists in all these cases, A. & M. Trading, Ackerly, Frene, International Shoe, * * *."

The Court goes on to say at page 602, second column, bottom:

> "* * * A. & M.'s approval of Frene and International Shoe shows that New Jersey's intent in its service procedure was to cover situations at least as minimal as those set forth in Frene and International Shoe.
>
> "Indeed, as Partin says, 202 F. 2d at page 543, it would seem that International Shoe 'made possible a wider assertion of State judicial jurisdiction than theretofore had been thought permisible'. And as Frene says: 'The trend has been toward a wider as-

sertion of power over nonresidents and foreign corporations than was considered permissible when the tradition about "mere solicitation" grew up.' 134 F. 2d at page 516. In short, while International Shoe recognizes that the facts there show how little more than 'mere solicitation' will suffice for valid service, that case does not say that same is the minimal requirement for valid service. Its real holding is, as A. & M. Trading Corp. construes it to hold, 'that the due process requirements of the 14th Amendment are satisfied if the suit does not offend "traditional notions of fair play and substantial justice" * * *.' 13 N. J. at page 523, 100 A. 2d at page 516."

After the decision in *Mc Gee* v. *International Life Ins. Co., supra,* and the decision in *Miklos* v. *Liberty Coach Co.,* 48 N. J. Super. 591 (1958), 138 A. 2d 762, and on June 27, 1958, the Supreme Court of New Jersey amended the Rules of Court at Paragraph (d) of Revised Rule 4:4-4, so that if service of summons and complaint was unavailable in New Jersey,

"* * * and the corporation is a foreign corporation, then, *subject to due process of law,* mailing, by registered mail return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office * * *"

would be legal service for a New Jersey Court to acquire jurisdiction.

The purpose of the said amendment was to subject foreign corporations to personal service by registered mail, *subject to due process of the law,* as set forth in *Mc Gee, supra.* Thus the making of a single contract within New Jersey is a contact sufficient to give the State Court juris-

diction over a foreign corporation by registered mail service. The *International Shoe, supra* and *Mc Gee, supra,* recognize the changes brought about by the tremendous technological and economic progress achieved in our day, and they greatly expanded the power of the State Court to exert jurisdiction over foreign corporations since the decision of *Pennoyer* v. *Neff,* 95 C. S. 714, 24 L. Ed. 565 (1877).

In its opinion, the Appellate Court agreed that the amendment to the Revised Rule of the New Jersey Supreme Court, R.R. 4:4-4(d) was adopted to enable the New Jersey Courts to exert the expanding *in personam* jurisdiction over foreign corporations *as far as the due process of the law would allow* (P7a). However, in its grappling with the problem of the *quantum* of "minimal contacts" required to exercise such jurisdiction by the foreign tribunal, the Appellate Court reverted in its thinking and reasoning to the antiquated theory of "activities" within the state of the forum, rather than "minimal contacts" therein. This misapprehension is evident from the Appellate Court's quotation from the argument contained in the brief of Earth Movers, describing the "activities" that governed *in personam* jurisdiction of the law prior to *International Shoe* and *Me Gee, supra* (P6a). Thus, by its philosophy and determination, the Appellate Court equated "activities" with "minimal contacts" and overlooked the test set forth in *Mc Gee* that the foreign corporation have certain "minimal contacts" with the state of the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice", and that it is sufficient for the purpose of due process that the suit is based on a contract which has substantial connection with the state of the forum. Thus the standards laid down by this Court in its decisions were not applied by the New Jersey Appellate Court in determining the *quantum* of the contacts of Earth Movers with the State of New Jersey.

The lower Court also erroneously concluded that *Mc Gee* applies solely to contracts in the insurance field. It observed that the petitioners' third party complaint was not upon a contract. It said that since the contract did not provide for indemnification or contribution, or that Earth Movers was to carry insurance, it concluded that petitioners were being sued for their own faults, including an alleged violation of a Delaware statute (P10a).

If *Mc Gee* is applicable solely to contracts in the field of insurance, certainly this Court has not so stated and has not heretofore so limited the application of *Mc Gee*. And while petitioners' third party complaint is not upon the contract consummated in New Jersey, their cause of action arises from a contractual relationship based upon that contract, absence of which none of the parties to this action would be in the New Jersey State Court today.

Furthermore, as the petitioners claim indemnification or contribution from Earth Movers, such claim is based upon an implied contractual relationship imposed by law, even though the primary contract between Earth Movers and Stanker and Galetto, is silent as to the same. Moreover, if there be a case wherein fair play and substantial justice requires that a nonresident properly served in accordance with law of the forum should be subject to suit, the case *sub judice* is such an one. For, while Earth Movers is the third party defendant, its alter ego in the matter is its liability insurance carrier; hence, in reality an insurance contract is incidentally involved in this action and subjecting Earth Movers to the jurisdiction of the New Jersey Court does not offend, but rather conforms with "traditional notions of fair play and substantial justice."

The Appellate Court admits that the New Jersey Revised Rule 4:4-4(d) was adopted by the New Jersey Supreme Court "to enable" its courts "*to exercise that jur-*

isdiction as far as due process of law will allow" (P7a). Thus, the Appellate Court confirms the adherence of the New Jersey Supreme Court to the landmark case of International Shoe and that the purpose for the adoption of R.R. 4:4-4(d) was to open the New Jersey Courts to suits that meet minimal Federal due process requirements. It is quite evident that such was the purpose of the New Jersey Supreme Court since it inserted in the said Rule the words—"*subject to due process of law*, by mailing, registered mail return receipt requested, a copy of the summons and complaint to * * * its principal place of business, or its registered office".

Therefore, it is crystal clear that the New Jersey Supreme Court chose the Federal minimal due process requirements and adopted the standard laid down by this Court to be applied in extending the *in personam* jurisdiction of the New Jersey Courts over foreign corporations.

Furthermore, the New Jersey Supreme Court confirmed its adherence to the Federal Minimal due process requirements when it affirmed by *per curiam* opinion in 39 N. J. 32, 186 A. 2d 679 (1962) the case of *Hoagland* v. *Springer* (75 N. J. Superior 560, Appellate Division, 183 A. 2d 678, 1962) and stated its unanimous affirmance was based on "the reasons expressed in the opinion of Judge Goldman in the Appellate Division."

In *Hoagland, supra,* 183 A. 2d 678, at page 681, Judge Goldmann stated:

> "To subject a foreign corporation to a judgment in personam, where that corporation is not present within the territory of the forum, due process requires only that it have 'certain minimum contacts with (the forum) such that the maintenance of the suit does not offend' 'traditional notions of fair play and substantial justice' ". * * * citing *International Shoe* v. *State of Washington.*

"As Chief Justice Stone said in that case, the demands of due process 'may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." * * * "The test is not whether the foreign corporation's activity in the state of the forum 'is a little more or a little less', but rather 'the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.' "

"In McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), the court found it sufficient for the purposes of due process that the California suit against a Texas insurance company, which had been served in Texas, was based upon a single contract of reinsurance that had 'a substantial connection' with California. Justice Black, speaking for the court, noted that in a continuing process of evolution the Supreme Court had accepted and then abandoned 'consent,' 'doing business,' and 'presence' as a standard for measuring the extent of state judicial power over foreign corporations. * * *"

We quote further from said opinion on page 683 of the Atlantic Reporter:

"* * * The trend in defining due process is away from the court having immediate power over a defendant and toward the court in which both parties may conveniently settle their dispute. And in defining due pro-

cess of the law, the trend is away from emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard. The implications of the International Shoe and McGee cases are part of these trends, and the broad standards there laid down will undoubtedly be attended by further extension."

"Our own jurisdiction has drawn inspiration from the new approach to jurisdiction indicated in the cited United States Supreme Court cases. See Miklos v. Liberty Coach Co., 48 N. J. Super. 591 (App. Div. 1958), which resulted in the amendment of R.R. 4:4-4(d) by adding the italicized clause quoted above; * * *."

The clause italicized to which Judge Goldmann referred to in the above case is the Revised Rule heretofore set forth herein, concerning service upon foreign corporations.

In the case *sub judice*, the respondent did not raise the issue of *forum non conveniens*, nor did it contend that it did not have adequate notice of the suit or sufficient time to prepare its defense and appear. The minimum requirement of due process—notice and opportunity for a hearing, was not questioned. The summons and complaint (A18a to A21a) were received and indeed, in response to the same, the respondent came into our New Jersey Court and made the motion to dismiss the service (A24a, A25a), its contentions dwelling at length on the lack of "activities" in the State of New Jersey, and that it had never done "business" in New Jersey. The respondent did not produce any proof that it would be prejudiced or inconvenienced by being subjected to the jurisdiction of the New Jersey courts. As the party principally and primarily liable for any damages that may have been suffered by the plaintiff, David Webb, Jr., the traditional notions of fair play and justice require respondent's presence in this suit. The

fundamental purpose of our practice is to dispose of all issues between all parties in a transaction giving rise to a cause of action. *Ertag* v. *Haines,* 30 N. J. Superior 225 (1954), 104 A. 2d 81. It is clear that the alleged injuries of the Plaintiff, Webb are connected by a series of events that had a factual beginning or connection with the petitioners in the State of New Jersey. It begins with the negotiation and procurement of the subcontract from the petitioner, Stanker & Galetto, Inc. by the respondent by mail across state lines (A36a), then followed by subsequent performance of the contract by respondent in the foreign state by "filling" the ground at the construction site, and the alleged sinking of the wheels of the truck into the "fill" by consequence of which the plaintiff alleges he was injured. In the interim, the petitioner, Stanker & Galletto, Inc. by mail, receives invoices (A39a) from the respondent and the petitioner thereupon made payments thereof by mailing its checks to the respondent across state lines. There is accordingly, a series of events that had important and real connection with the State of the forum such as to constitute a "substantial connection" as required by the *McGee* case, *supra.*

We contend that under the Federal Minimal due Process requirements, a greater *quantum* of "contacts" is not required under the decisions of this court. Since the Supreme Court of New Jersey has adopted the Federal minimal due process requirements, this Court's standards for the exercise of judicial *in personam* jurisdiction over foreign corporation has been misconstrued and misapplied in the case at bar.

We submit that the Appellate Division was unduly influenced in its thinking by the admonition of this Court contained in *Hanson* v. *Denckla,* 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283, 1296, that it is a mistake to assume that the flexible standard of *International Shoe* is a trend that

heralds the eventual demise of all restrictions on the personal jurisdiction of state courts (P7a). However, the *Hanson* case is materially distinguishable from the facts of the case *sub judice*. In *Hanson*, the Delaware trustee did not participate in any solicitation of business within the state of Florida either in person or by mail, and the trust instrument, the validity of which was involved in the Florida judgment, was executed in the foreign state of Delaware. While the admonition by this Court in *Hanson* is correctly taken, nevertheless such assertion by this Court has served to cause the Appellate Court to be overly cautious and to hold within unintended bounds the expansive view of *International Shoe* and *McGee*.

We further submit that the Appellate Division opinion was grounded in error when it said that it did not agree that the holding in *McGee* applies to all contracts (P9a). It viewed with favor the note in 73 Harv. L. Rev. 909 at page 928 wherein the author states his belief that *McGee* will be confined solely to insurance contracts. We cannot find anything in *McGee* which places such limitation upon contracts. The sole limitations are certain minimum contacts such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.

That the Appellate Division has confused the Federal minimal due process requirements with the rigid requirements prior to *McGee* and *International Shoe* is evidenced by its citation (P10a) of the case of *Rosenberg Brothers & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, 43 S. Ct. 170, 67 L. Ed. 372 (1923). In *Rosenberg Brothers, supra*, this Court concerned itself with the question as to the manner and extent, at the time of the service of process, the foreign corporation was "doing business" within the state of New York. This Court therein applied the standard of "doing business". Since *McGee*, this standard for measuring the extent of state judicial power over foreign corpora-

tions is no longer applicable. Thus, the judgment of the Appellate Division is founded upon reversible error since it equated "minimal contacts" with the "doing business" standard.

We submit that the test prescribed in *International Shoe* is to be elastically and equitably applied to a given set of facts. The rule of "minimum contacts" has for its justification the concept of accomplishing substantial justice in each case. We believe that the present approach of this Court, which was adopted by the Supreme Court of New Jersey, is to accomplish this end. With the economic growth of this country, cases of similar nature are to be decided so as to fit into a mosaic making up a larger pattern of legal truth and justice than any one case can encompass. Therefore, we contend that *McGee* was not intended to be limited solely to insurance contracts. And we further contend that "traditional notions of fair play and substantial justice" is a standard to be applied not only to a foreign defendant but it must also inure to the benefit of a complaining litigant of the forum, when the facts of the particular case so warrant.

It may again be noted that the very essence of *International Shoe* is that the question of whether due process limitations have been met is not answered by determining whether the corporate activity "is a little more or a little less", but rather by determining whether "the quality of the activity in relation to the fair and orderly administration of the law which it was the purpose of the Due Process Clause to insure" is present in a particular case.

We submit to this Court that the facts of the case *sub judice* require that the petitioners should be protected by a fair and orderly administration of justice because it is very clear that the respondent is primarily answerable for any damages that may have been sustained by the plaintiff Webb, and that there is no logical and legal reason why

the respondent's insurance carrier cannot just as effectively represent the respondent in New Jersey as in Delaware.

As Judge Goldman observed in *Hoagland* v. *Springer, supra,* at page 571:

> "All in all, it is more desirable and practical to bring all the parties together in one action and thus avoid a multiplicity of suits * * *."

It is respectfully urged that the trial Court's decision and the Appellate Court's decision were induced by an erroneous view of the law.

POINT II

Furthermore, the questions presented are of far-reaching importance to all states and are of great and recurring significance in the administration of justice in State courts.

While we have not attempted a statistical research of the reoccurrence of the questions presented in this case in state courts, we believe that this Court has taken judicial notice of the same. This vexing question remains a continual source of controversy in other jurisdictions. The misinterpretation and misapplication of this Court's standards for the exercise of judicial *in personam* jurisdiction over foreign corporations where a state court has adopted the federal minimal due process requirements, requires that this Court make a pronouncement as to whether or not the ruling in *McGee* shall be limited to contracts of insurance. The present status of the law also requires that this Court declare whether or not the rulings in *International Shoe* and *McGee* shall apply to tort actions arising out of a contractual relationship and not merely to actions upon the particular contract solicited and consummated within the state of the forum.

In fact, the state courts await the further decisions of this Court on questions concerning the federal minimal due process requirements. In *Dowd* v. *Boro Drugs, Inc.*, 70 N. J. Super. 488, 176 A. 2d 13 (App. Div. 1961), the New Jersey Appellate Division has so indicated on page 23 of the Reporter, as follows:

> "• • • While we have taken due note of the trend towards expanding state jurisdiction over foreign corporations and other non-residents, as referred to in McGee v. International Insurance Co., supra, in the absence of a pronouncement by our own Supreme Court, we look to the court of ultimate authority in such cases for any reduction in the requirements of due process under the Fourtheenth Amendment • • •."

We submit that it is apparent that any definition of "minimum contacts," and also of "traditional notions of fair play," will require an evolutionary process rather then a quick definitive statement, as these terms involve subjective judgments that must be based upon a multitude of variant factors as they are presented in a multitude of cases. The existence or non-existence of the necessary "minimum contacts" to justify the upholding of personal jurisdiction over foreign corporations under the Fourteenth Amendment as interpreted in *International Shoe* by this Court must be obviously worked out with reference to the facts of a particular case rather than in a statement of dogmatic rules of all-inclusive principles. For these reasons this Court should take jurisdiction of this case. Only this Court can explain its decisions adequately.

The facts of the case *sub judice* involve the commission of a tort arising out of the performance of the contract by the foreign corporation. The question presented herein has not been settled by this Court and it should be settled

for it concerns the exercise of jurisdiction in the constantly expanding law of Torts. It arises at a time when the activities of the citizens of the several states have become sufficiently extended and far reaching in their effect and consequences so that to deny jurisdiction in the present type of case unduly hampers the power of state courts, is detrimental to the protection of the rights of the citizens of New Jersey and may well result, as in this case, in a piece-meal determination of the issues involved. The result will be a multiplicity of actions with long delays and a possible denial of justice to petitioners.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient gravity and importance to require this Court to issue a Writ of Certiorari to the New Jersey Superior Court, Appellate Division to revew its decision made herein.

AUGUSTINE A. REPETTO,
Counsel for Petitioners.

ERNEST M. CURTIS,
On the Brief.

APPENDIX A

Order of the New Jersey Supreme Court Denying Petition for Certification

(Filed—September 14, 1964)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the fourteenth day of September, 1964.

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX B

Mandate on Affirmance of the Superior Court, Appellate Division

(Filed—June 11, 1964)

This cause having been duly argued before this Court by Augustine A. Repetto, counsel for the appellants Stanker & Galetto, Inc., and Jay H. Greenblatt, counsel for the respondent Earth Movers, Inc., and the Court having considered the same,

It is hereupon ordered and adjudged that the Interlocutory order dated July 26, 1963 of the said Superior Court, Law Division, is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Superior Court, Law Division, to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division at Trenton on the 11th day of June, 1964.

I. GRANT SCOTT
Clerk of the Superior Court

APPENDIX C

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—June 11, 1964)

Argued April 6, 1964—Decided June 11, 1964.

Before Judges Gaulkin, Foley and Lewis.

Mr. Jay H. Greenblatt argued the cause for Earth Movers, Inc., Respondent (*Messrs. Greenblatt and Greenblatt,* attorneys).

Mr. Augustine A. Repetto argued the cause for Stanker and Galetto, Inc., et als., Appellants.

No appearance for any other party.

The opinion of the Court was delivered by
GAULKIN, S. J. A. D.

Stanker and Galetto, Inc., a New Jersey corporation, (hereafter Stanker), filed a third party complaint against Earth Movers, Inc., a Delaware corporation. Earth Movers was served by certified mail, pursuant to *R.R.* 4:4-4(d). The trial court granted Earth Movers' motion to set aside the service, and Stanker appeals.

The motion was heard on affidavits. The following facts appear from the pleadings and affidavits.

In 1960 U. S. Plywood entered into a contract with Hastings and Eskridge, general contractors, for the construction of a warehouse in Seaford, Delaware. Hastings and Eskridge contracted with Earth Movers to do the filling, grading and blacktopping about the building. Hastings and Eskridge abandoned the contract because of the death

of Hastings, and Stanker contracted with U. S. Plywood to complete the job as general contractors. Stanker's agent went to the office of Earth Movers, in Seaford, and arranged for Earth Movers to do the filling, grading and blacktopping as Stanker's sub-contractor. Earth Movers prepared a writing setting forth the work to be done, at a price of $8,000, and mailed it in duplicate to Stanker's office in Vineland, N. J. Stanker signed one copy "Accepted" and returned it, by mail, to Earth Movers. Earth Movers then did the work it proposed to do, and Stanker paid it the $8,000 by checks mailed from Vineland.

Stanker subcontracted the painting of the warehouse to Webb Construction Company, Inc., a Delaware corporation. Plaintiff David B. Webb, Jr. (hereafter Webb), a resident of Seaford and an employee of Webb Construction Company, was injured while engaged in painting the warehouse.

Webb instituted an action in the Superior Court, Law Division, Cumberland County, against Stanker and its officers individually, for damages. His complaint alleged that he fell from a scaffold mounted on a motor truck because the wheels of the truck sank "into loose earth * * * that had been deposited * * * at the instance and direction * * *" of defendants. Webb charged that Stanker and its officers were liable for his injuries because:

> "9. It became and was the affirmative duty of the corporate defendant to employ competent supervisors and overseers; to see that the said scaffold was maintained in a proper and horizontal position so that the same would not tilt or tip over; to see that the firmament upon which the truck would necessarily rest was of sufficient rigidity, thickness and strength to bear,

sustain and support the weight of the truck and its scaffolding so that it would have a secure footing; to furnish the plaintiff with a safe place to work; to properly inspect and make certain that the work area and its ways and approaches that were assigned to him were in reasonably safe condition; to alert and warn the plaintiff of a hazard then and there existing in an imminently dangerous condition, and which was not open, patent or visible to plaintiff; to faithfully and fully comply, as required, with the statutes of the State of Delaware, viz: the provisions of Title 16 of the Delaware Code Annotated (1953), in such case made and provided and dealing with the health, safety and welfare of laborers, such as the plaintiff; and properly to supervise and direct the work of the plaintiff, which it had undertaken to do and to furnish such devices as to reasonably have guarded him against injury."

Stanker made no motion to dismiss the complaint on the ground of *forum non conveniens*. *Cf. Vargas* v. *A. H. Bull Steamship Co.*, 44 N. J. Super. 536 (Law. Div.), aff'd, 25 N. J. 293 (1957); "Developments in the Law: State—Court Jurisdiction," 73 Harv. L. Rev. 909, 1012-1013 (1960). It filed an answer denying liability, and a third party complaint against U. S. Plywood and Earth Movers. The allegations of the third party complaint against U. S. Plywood have no bearing on the issue before us. As against Stanker the third party complaint alleges in substance that (to quote the affidavit of Stanker's counsel): "* * * it was Earth Movers, Inc., in fulfillment of their contract to place fill in the area surrounding the erection on the premises, who would or should be chargeable with the negligence

claimed by plaintiff to have caused the accident and Earth Movers, Inc. would accordingly be liable by way of indemnification or at least as a joint tortfeasor."

Earth Movers had no contact with New Jersey except as above set forth. As its brief says: "* * * It is a family corporation which is not and has never been authorized to do business in New Jersey nor has it ever filed an application for the purpose of being authorized to do business in New Jersey. Its officers never have and do not own property, real or personal, within the borders of New Jersey. It does not nor has it ever owned property, real or personal, in New Jersey. It does not manufacture products for sale in New Jersey, and it has never sold anything in the State of New Jersey. It has no agents or representatives in the State of New Jersey, and never had any agents or representatives in New Jersey. It has no office or place of business in New Jersey. It does not nor has it ever solicited business by mail, advertisement or otherwise in New Jersey. It never had nor does it now have a mailing service for the purpose of soliciting business. It never has and it does not now advertise in any magazine, newspaper or other periodical for the purpose of soliciting or obtaining business. The only place in which the name appears is in the yellow pages of the Lower Delaware telephone directory, and at times the name of the corporation appears on periodicals sponsored by local charitable organizations, such as churches. It never has nor does it now have a telephone or other listing anywhere in the State of New Jersey. Earth Movers, Inc. never did any business in New Jersey nor did it perform any service in New Jersey at any time prior to the happening of the accident in this cause." And, of course, the contract was to be performed in Delaware, the accident happened in Delaware, and Webb is a resident of Delaware.

Judge Arthur L. Joseph held that these facts "fail to establish the necessary minimum contacts in New Jersey on the part of Earth Movers, Inc., a Delaware corporation, to give this Court jurisdiction over said corporation by service of process under R.R. 4:4-4(d)." We agree.

Stanker's able brief argues that the trend of the law is to expand *in personam* jurisdiction over foreign corporations, and that our R.R. 4:4-4(d) was adopted to enable our courts to exercise that jurisdiction as far as due process of law will allow. With this we agree, but, as the Supreme Court said in *Hanson* v. *Denckla*, 357 U. S. 235, 2 L. ed. 2d 1283, 1296, 78 S. Ct. 1228 (1958):

> "* * * the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, to the flexible standard of International Shoe Co. v. Washington, 236 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1957. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U. S. 416, 418, 1 L. Ed. 2d 1456, 1459, 77 S. Ct. 1360. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."

In *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957), plaintiff's son

had purchased a life insurance policy in 1944 from Empire Mutual Insurance Company, an Arizona corporation. In 1948 defendant, a Texas corporation, assumed Empire Mutual's obligations. Defendant mailed a reinsurance certificate to the son in California and offered to continue his insurance. The son accepted the offer and thereafter mailed the premiums from California to defendant in Texas until 1950, when he died.

Neither Empire Mutual nor defendant ever had an office or agent in California. There was no evidence that defendant ever solicited or did any other insurance business in California.

In 1949 California passed a statute which subjected foreign corporations to suit in California on insurance contracts with residents of that state even though such corporations cannot be served with process within its borders. Pursuant to that statute, plaintiff served defendant by registered mail addressed to its Texas office. Defendant entered no appearance in the action and judgment went against it in California by default. Plaintiff then sued on the judgment in Texas, but the Texas courts refused to enforce the judgment holding it was void because service of process outside California could not give the courts of California jurisdiction. The Supreme Court reversed, saying:

> "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' * * * It is sufficient for purposes of due process that the suit was based on a

contract which had substantial connection with that State. Cf. Hess v. Pawloski, 274 US 352, 71 L. ed. 1091, 47 S. Ct. 632; Henry L. Doherty & Co. v. Goodman, 294 US 623, 79 L ed 1097, 55 S Ct 553; Pennoyer v. Neff, 95 US 714, 735, 24 L. ed. 565, 573. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality." 2 L. ed. 2d at 225-226.

Stanker argues that this case is on all fours with *McGee* —the contract with Earth Movers was made in New Jersey when Stanker accepted Earth Movers' proposal; the payments on account of the contract were mailed from New Jersey; and our R.R. 4:4-4(d) is the equivalent of the California statute.

We do not agree that the holding in *McGee* applies to all contracts. As the author of the note in 73 Harv. L. Rev. 909, *supra*, says at p. 928: "The furthest extension of jurisdiction based on an isolated contract has been in the insurance field. * * * There are several factors present which explain the extended jurisdiction in these cases, although the

more extreme results may not appear justifiable on an interest analysis. First, the Supreme Court has long recognized a unique state interest in insurance contracts. Second, in selling the policy to an out-of-state plaintiff the insurance company asserts its ability and willingness to investigate any pay claims within the forum. Finally, litigation is a normal part of the insurance company's business and should be regarded as a cost of making a profit within the forum."

In *Hanson* v. *Denckla, supra,* at 2 L. Ed. 2d 1297, Chief Justice Warren said:

> "* * * This case is also different from McGee in that there the State had enacted special legislation (Unauthorized Insurers Process Act) to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation."

Furthermore, here Stanker's third party complaint was not upon the contract. The contract did not provide for indemnification or contribution or that Earth Movers was to carry insurance. Stanker was being sued for its own faults, including an alleged violation of a Delaware statute.

If Webb had not sued Stanker, and Stanker sued Earth Movers in New Jersey on the contract, it seems to us that our courts would not be able to obtain *in personam* jurisdiction over Earth Movers with service by mail. Earth Movers contacts with New Jersey were not enough to permit such service under the standards presently laid down in the decisions of the United States Supreme Court cited above and our own courts. *See also Rosenberg Broth-*

ers & Co. v. *Curtis Brown Co.*, 260 U. S. 516, 67 L. Ed. 372, 43 S. Ct. 170 (1923).

Stanker argues that "Retaining jurisdiction of Earth Movers Inc. avoids multiplicity of suits * * *," and that Earth Movers would not be inconvenienced by appearing in our courts, Seaford being close to Bridgeton, the county seat of Cumberland County. That may be true, but the fact that Webb's action makes our courts the most convenient ones for the disposition of all of the issues in the litigation and that it would not be inconvenient for Earth Movers to appear here may not be accepted as a substitute for the constitutional necessity of "minimal contacts with that State that are a prerequisite to its exercise of power over" it. *Hanson* v. *Denckla, supra.*

The judgment is affirmed.

APPENDIX D

Judgment of Dismissal of the Superior Court, Law Division of Cumberland County

(Filed—July 26, 1963)

This matter being opened to the court by Greenblatt and Greenblatt, attorneys for third-party defendant Earth Movers, Inc. (M. Joseph Greenblatt appearing) and in the presence of Augustine Repetto, attorney for third party plaintiff Stanker and Galetto, on motion for a dismissal of the service of process (the same having been made pursuant to R.R. 4:4-4(d)), and the court having examined the pleadings, the affidavit submitted in support of said motion and the affidavits submitted by the third party plaintiff in opposition thereto, and having heard and considered the argument of counsel, and being satisfied that the activities of the third party defendant Earth Movers Inc., in this state, if any, are not sufficient in law to sustain the said service of process within said rule:

It is on this 26th day of July, 1963, Ordered that the service of the summons in this cause upon the third party defendant Earth Movers Inc. be and the same is hereby dismissed with costs.

/s/ Arthur L. Joseph
C. C. J.

I consent to the foregoing order as to form.

/s/ Augustine A. Repetto
Attorney for Third-Party Plaintiff,
Stanker and Galetto.

APPENDIX E

Oral Opinion of the Superior Court, Law Division, Cumberland County

(Filed—July 11, 1963)

"* * * The Court: Gentlemen, I have read and considered all the pleadings in this case, the affidavits filed in connection with the motion, and the brief filed, and have now considered the arguments of counsel.

The facts are substantially undisputed.

The only issue for determination is whether the process as served is sufficient to give this Court jurisdiction over Earth Movers Inc.

Due process is complied with in service of process by registered mail on a foreign corporation, if said corporation has certain minimum contacts in New Jersey so that the maintenance of suit does not offend traditional motions of fair play and substantial justice, and that is the relevant portion under R.R. 4:4-4(d).

The applicable standards to be met to give the State jurisdiction over foreign corporations are that corporations must do some act or consummate some action within forum, and the cause of action must be one which arises out of, or results from, activities of the corporation within the forum, and assumption of jurisdiction must be consonant with due process tenets of fair play and substantial justice.

I shall not discuss the case of Miklos v. Liberty Coach Company, 48 Super. 591, with which I am sure counsel is familiar, which case led our Supreme Court to amend R.R. 4:4-4(d), by adding the service by registered mail.

Appendix E

The problem lies in determining whether the foreign corporation has the requisite minimum contacts in New Jersey to give our court in personam jurisdiction.

Our philosophy is set forth in International Shoe Company v. State of Washington, a U. S. decision, and more recently in the case of Hoagland v. Springer, 74 N. J. Super. 275, which was affirmed by our Appellate Division in 75 N. J. Super. 560, and again affirmed by our Supreme Court in 39 N. J. 32.

Did the defendant, Earth Movers Inc., do some act or consummate some transaction within the forum, and does the cause of action arise out of or does it result from activities of Earth Movers Inc., within the forum, and would its activities give our Courts jurisdiction in addition thereto consonant with due process tenets of fair play and substantial justice?

I think that is the question before me today, gentlemen.

The test is not whether the foreign corporation's activity in the state or forum is little or more, but rather the quality and nature of the activity in relation to the fair and orderly administration of the laws, it was the purpose of the due process clause to insure.

The question is, did the defendant do some act or consummate some transaction within the State and, in addition thereto, does the cause of action arise out of or does it result from activities of Earth Movers within the forum.

As to the problem of convenience, we do not have that before us as was stated by counsel for the defense. As a matter of fact, the same works in reverse, gentlemen. Delaware is close to New Jersey, and it works in reverse, so that that problem I do not have to consider.

Appendix E

I am aware and have taken cognizance of the fact that there was correspondence between the parties, at least concerning a proposal, and that eventually the proposal was accepted, and perhaps from a contractual standpoint perhaps the contract was consummated in New Jersey, that may be true; but taking everything into consideration, the affidavits and the law on the subject, I am of the opinion that the facts in the present case fail to establish necessary minimum contacts in New Jersey on the part of Earth Movers Inc., a Delaware corporation, to give this Court jurisdiction over said corporation by service of process under R.R. 4:4-4(d).

Therefore, the motion to dismiss the service of process is granted.

Mr. Greenblatt, if you will present the appropriate order in conformity with my conclusions, I will sign the same.

The order will be forwarded to counsel for approval as to form."

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No. 727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

STANKER AND GALETTO, INC., a corporation of New Jersey, and LEON STANKER and PETER GALETTO, Individually,

Petitioners,

vs.

EARTH MOVERS, INC., a corporation of Delaware,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION.

BRIEF FOR RESPONDENT IN OPPOSITION.

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JAY H. GREENBLATT,
Of Counsel on the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 727

STANKER AND GALETTO, INC., a corporation of New Jersey, and LEON STANKER and PETER GALETTO, Individually,

Petitioners,

vs.

EARTH MOVERS, INC., a corporation of Delaware,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED

1. Whether the respondent had a substantial minimum contact with the State of New Jersey so as to allow a New Jersey Court to exercise *in personam* jurisdiction through service of process by registered mail pursuant to The Revision of the Rules Governing the Courts of the State of New Jersey, R. R. 4:4-4(d)?

2. Whether convenience and practicality are the determining factors in establishing a state court's *in personam* jurisdiction of a foreign corporation where service of process has been by registered mail?

STATEMENT OF THE CASE

In 1960 U. S. Plywood Corp. desiring to erect a warehouse on Route 13A south of Seaford, Delaware, entered into a contract with the firm of Hastings and Eskridge, general contractors, for the construction of that building. Hastings and Eskridge thereafter entered into a verbal contract with the respondent Earth Movers, Inc., a Corporation of the State of Delaware with offices in Seaford, Delaware, for grading, blacktopping, and similar work in the construction of that building. Soon thereafter Mr. Hastings died and all work on the project was suspended and Earth Movers, Inc. was paid for work done by it to that date. Thereafter, one Mr. Peter Galetto of the firm of Stanker and Galetto, Inc. went to the offices of Earth Movers, Inc. in Seaford, Delaware, and informed Mr. Louis H. Callaway, President of that firm that Stanker and Galetto had contracted to complete the building project for U. S. Plywood Corp. and solicited the service of Earth Movers, Inc. Discussion was had at that time as to the terms of the verbal contract theretofore entered into between Earth Movers, Inc. and Hastings and Eskridge, certain portions of which were eliminated by Mr. Galetto and a price agreed upon. In order to formalize the agreement, a written proposal was prepared by Earth Movers, Inc. (Petitioner's Appendix Below, p. 36a) and as the affidavit of Mr. Peter Galetto claims (Petitioner's Appendix Below, p. 30a), it was mailed to him in Vineland and formally accepted by him. Thereafter, the only interstate matter that occurred was the statement sent by Earth Movers, Inc. (Petitioner's Appendix Below, p. 39a) and the payments made by Stanker and Galetto, Inc. by checks mailed from New Jersey to Delaware (Petitioner's Appendix Below, p. 40a). The

above facts are established by the affidavit of Louis H. Callaway (Petitioner's Appendix Below, p. 25a).

On August 17, 1962, the plaintiff Webb commenced an action against petitioners, Stanker and Galetto, Inc., et als., and by an amended complaint (Petitioner's Appendix Below, p. 1a) alleged injuries and losses which Plaintiff claims he suffered when he fell while working as a painter on premises at Seaford, Delaware, in the course of the erection of the premises by petitioners as the prime contractors. On September 5, 1962, Stanker and Galetto, Inc., et als., filed an answer denying negligence (Petitioner's Appendix Below, p. 13a) and thereafter by leave of Court by order of March 11, 1963 (Petitioner's Appendix Below, p. 17a), instituted a third party action against Earth Movers, Inc. and others (Petitioner's Appendix Below, p. 18a) asserting a right to indemnification or at least to a proportionate participation as joint tortfeasors. U. S. Plywood Export Corp. and U. S. Plywood Corp. as the other Third Party Defendants were served with process of summons within the State of New Jersey and thereafter filed Answer joining issue. Earth Movers, Inc. was served by registered mail at Seaford, Delaware, with the return receipt, carrying the signature of an agent of this Delaware Corporation (Petitioner's Appendix Below, p. 23a). Earth Movers, Inc. thereafter moved by notice of motion and supporting affidavit returnable on June 28, 1963, to dismiss the service for lack of jurisdiction (Petitioner's Appendix Below, pp. 24a-25a). After presentation of oral argument and the affidavit of Peter Galetto for Stanker and Galetto, Inc., et als. (Petitioner's Appendix Below. p. 29a) and the affidavit of Louis H. Callaway for Earth Movers, Inc. (Petitioner's Appendix Below, p. 24a), the trial court, based on an oral opinion rendered on July 11, 1963 (Appendix E of Petition, p. 13a), entered an order dated July 26, 1963, dismissing service of process on the respondent (Ap-

pendix D of Petition, p. 12a). Motion for leave to appeal from the interlocutory order was made on August 26, 1963, and an order granting leave to appeal was granted on September 17, 1963 (Petitioner's Appendix Below, p. 46a). Thereafter, notice of appeal was filed (Petitioner's Appendix Below, p. 48a), briefs submitted, argument heard and by Opinion dated June 11, 1964 (Appendix C of Petition, p. 3a), the judgment of the trial court was affirmed, a Mandate on Affirmance being issued (Appendix B of Petition, p. 2a).

Notice of Petition for Certification, Petition for Certification and a brief in opposition to the petition were served and filed and on September 14, 1964, the Supreme Court of New Jersey denied certification (Appendix A of Petition, p. 1a).

ARGUMENT

I.

The Decision Below Is Clearly Correct

The petitioners' contention that the decision of the Court below was not in accord with the applicable decisions of this Court is based on four reasons stated in the petition. The reasons given are (1) that the Appellate Court erroneously took into consideration the absence of "activities" of the respondent in the State of New Jersey in determining whether the respondent had a sufficient minimal contact with the State of New Jersey so as to allow the state court to exercise in personam jurisdiction where service of process was by registered mail (Petition, p. 14); (2) that

the Appellate Court erroneously interpreted the opinion in *McGee v. International Life Ins. Co.*, 355 U. S. 220, by concluding that a persuasive factor in that case was that the contract sued upon was a contract of insurance (Petition, pp. 15, 20); (3) that the Appellate Court erroneously concluded that the petitioners' cause of action did not "arise out of" the contract between the petitioner and the respondent (Petition, p. 15), and (4) that convenience and practicality should have been deciding factors which properly considered in light of the facts, would have resulted in a reversal of the trial court's order by the Appellate Court (Petition, pp. 18, 21-22).

The petitioners play on words when they (Petition, p. 14) differentiate between ". . . 'activities' within the state of the forum, rather than 'minimal contacts' therein." It is submitted that the question of whether a foreign corporation has a sufficient minimal contact with a forum state is to be resolved in part by a consideration of the activities of that corporation in the forum state. That is a starting point. The recent decisions by this Court have demonstrated that where such activity may be slight, other factors involved in the particular case may create a situation in which service of process by registered mail would satisfy the purposes of due process. There is nothing "antiquated" about considering the activities of the foreign corporation within the forum as the petitioners have stated (Petition, p. 14). Contrary to the petitioners' assertion (Petition, p. 15), a consideration of such activities is as much the law today as it was prior to *McGee v. International Life Ins. Co.*, supra, and *International Shoe Co. v. Washington*, 326 U. S. 310. In *International Shoe Co. v. Washington*, finding the activities of the foreign corporation to be systematic and continuous rather than irregular and occasional, the Court stated (326 U. S. at p. 319):

> "But to the extent that a corporation exercises the privilege of conducting *activities* within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as these obligations arise out of or are connected with the *activities* within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances hardly be said to be undue." (Emphasis ours.)

In the *McGee* case, although the Court did not find the "systematic and continuous activity" of *International Shoe*, it did find that the one contract was a sufficient "minimal contact" under the circumstances, *viz.*, the cause of action was based directly upon a contract in which the state had a special interest, the Court stating (355 U. S. at p. 223):

> "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."

Although in the *McGee* case the activity of the foreign corporation had been only the solicitation and consummation of one contract in the forum state, such activity was thought by the Court to have created a sufficient minimal contact with the forum state. However, in reaching that decision, the slight activity of the foreign corporation was weighed with another compelling factor involved in that particular case. As the Court stated (355 U. S. at p. 223):

> "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."

That this factor was a compelling reason for the Court's determination was clearly shown by the Court six months

later in *Hanson v. Denckla*, 357 U. S. 235. At page 252 of that opinion, the Court stated:

> "This case is also different from McGee in that there the state had enacted special legislation (Unauthorized Insurers' Process Act) to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an *activity* that the state treats as exceptional and subjects to special regulation." (Emphasis ours.)

We note the fact that the petitioners have several times (Petition, pp. 15, 22) informed the Court that the respondent has insurance and have attempted in that manner to inferentially equate the facts of the instant case with those of the *McGee* case. We believe that the weakness of such an argument is obvious and make no further comment thereon.

Referring to the cases of *International Shoe* and *McGee* the Court in the *Hanson* case once again considered the *activity* of the foreign corporation in the forum state. Concluding that there was no sufficient minimal contact with the forum state, the Court said (357 U. S. at p. 251):

> "The cause of action in this case is not one that arises out of an *act done* or *transaction consummated* in the forum State." (Emphasis ours.)

The principle that the cause of action must arise out of the activity within the forum was considered by the Court in the cases of *International Shoe*, *McGee*, and *Hanson*. The petitioners concede that their third party complaint does not state a cause of action arising out of their formal contract with the respondent (Petition, p. 15) but claim that it "arises from a contractual relationship based upon that contract, absence of which none of the parties to this action would be in the New Jersey State Court today".

The petitioners seem to be suggesting the application of a "but for" rule which we submit is logically unsound. The petitioners again play on words when they state (Petition, p. 23) that "(t)he facts of the case *sub judice* involve the commission of a tort arising out of the performance of the contract by the foreign corporation". As was stated by the court below (Appendix C of Petition, p. 5a):

> "As against Stanker [*sic*] the third party complaint alleges in substance that (to quote the affidavit of Stanker's counsel): '* * * it was Earth Movers, Inc., in fulfillment of their contract to place fill in the area surrounding the erection on the premises, who would or should be chargeable with the negligence claimed by plaintiff to have caused the accident and Earth Movers, Inc. would accordingly be liable by way of indemnification or at least as a joint tortfeasor' " (Respondent's Appendix Below, p. 3a).

Negligence is not dependent upon a contract or its terms. One under contract to do certain work may be shown to be negligent although he has complied with the terms and specifications of the contract. Conversely, one may have technically breached a contract and yet in doing so may have acted in a reasonable manner so as not to have been negligent as to a third person. The petitioners and respondent could have been strangers, parties to no contract. To say that *but for* the contractual relationship the respondent would not have been in a position to have committed a negligent act or omission is highly illogical.

The petitioners contend that the respondent failed to prove that it would be prejudiced or inconvenienced by being subjected to the jurisdiction of the New Jersey Courts (Petition, p. 18), that there is no logical and legal reason why the respondent cannot as effectively be represented in New Jersey as in Delaware (Petition, p. 22), and that it is more desirable and practical to have all the parties

together in an action and thus avoid a multiplicity of suits (Petition, p. 22) with long delays and a possible denial of justice to the petitioners (Petition, p. 24).

As stated by the Court below citing *Hanson v. Denckla*, 357 U. S. 235,

> ". . . the fact that Webb's action makes our courts the most convenient ones for the disposition of all of the issues in the litigation and that it would not be inconvenient for Earth Movers to appear here may not be accepted as a substitute for the constitutional necessity of 'minimal contacts with that State that are a prerequisite to its exercise of power over' it." (Appendix C of Petition, p. 11a.)

Justice will not be denied the petitioners in any event. Should the plaintiff fail to recover a judgment against them, there will be no necessity for any further action, and should the plaintiff recover, the petitioners' cause of action can then be asserted against the respondent in the State of Delaware.

II.

The Judgment Below Is Not Final

The petitioners here originally petitioned the New Jersey Superior Court, Appellate Division, for leave to appeal from the *interlocutory* order of the trial court. The third-party complaint of the petitioners (Petitioner's Appendix Below, p. 19a) had alleged that the respondent would be liable to them for contribution as a joint tortfeasor or for indemnification for any judgment obtained by the plaintiff against the petitioners. The proof of such allegations would necessarily depend upon a showing that the respondent was negligent, that such negligence, either solely or in conjunc-

tion with the petitioners' negligence caused injury to the plaintiff, and that the plaintiff is entitled to judgment against the petitioners. Since this action has not yet come to trial, the order of the trial court dismissing service of process on the respondent is purely interlocutory and adjudicates none of the substantive rights or liabilities of the parties. Should the plaintiff recover no judgment against the petitioner, the petitioner would have no further cause of action against the respondent. The order dismissing service of process on the respondent being interlocutory, it is urged that such order is not a proper subject of review by this Court and that the lack of finality furnishes sufficient ground for denial of the petition. *Hamilton-Brown Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 258.

III.

There Is No Important Question of Federal Law

The third party complaint alleges a cause of action against the respondent for an alleged tortious act or omission which occurred, if at all, in the State of Delaware and was completely unrelated to and independent of any act of the respondent in the State of New Jersey. The petitioners suggest that "the questions presented are of far reaching importance to all states and are of great and recurring significance in the administration of justice in State Courts" (Petition, p. 22). Their brief, however, contains no citation to pending litigation or indication that such facts as those presented have ever arisen in an appellate court. The novelty of this case is the result of clear pronouncement by this Court.

The petitioners now ask this Court to make a pronouncement as to whether the ruling in *McGee v. International Life Ins. Co.*, is to be limited to contracts of insurance

(Petition, p. 22). We submit that the question has already been answered. If the Court in *McGee* did not intend to limit its ruling only to cases involving actions on insurance contracts, it is our belief that it did intend to limit it to cases where the State had enacted special legislation "to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation." *Hanson v. Denckla,* supra. The instant case presents no such situation.

The petitioners ask this Court to declare whether the rulings in *International Shoe* and *McGee* shall apply only where the cause of action arises out of the activity of the foreign corporation in the forum state. We submit that the question has already been answered in the affirmative. *International Shoe Co. v. Washington,* supra, *McGee v. International Life Ins. Co.,* supra, *Hanson v. Denckla,* supra.

Contrary to the petitioners' assertions, there appears no "vexing question", no "controversy in other jurisdictions", and no "misinterpretation and misapplication of this Court's standards" (Petition, p. 22). A correct decision based upon a simple fact situation should not be made to appear an important question of Federal Law of great and widespread concern.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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JAY H. GREENBLATT,

Of Counsel on the Brief.